IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1040~~ 70-295

FIRST NATIONAL CITY BANK,
Petitioner,

against

BANCO NACIONAL DE CUBA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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First National City Bank (formerly known and sued herein as The First National City Bank of New York) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit on remand, reinstating its earlier judgment, which reversed a final order and judgment of the United States District Court for the Southern District of New York granting summary judgment for petitioner and dismissing the action on the merits. This Court vacated that earlier judgment of the court of appeals and directed reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970.

Opinions Below

The majority and dissenting opinions in the court of appeals (Appendix A) are not reported. The order of this Court (Appendix B) is reported at 400 U.S. 1019 (1971).

The earlier opinion of the court of appeals (Appendix D) is reported at 431 F.2d 394, and the opinion of the district court (Appendix E) is reported at 270 F. Supp. 1004.*

Jurisdiction

The judgment of the court of appeals was entered April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. When this Court has vacated a judgment of a court of appeals and has remanded the case to that court for reconsideration in the light of views expressed by the Department of State, may that court reinstate its judgment in disregard of those views upon the ground that the court of appeals disagrees with the conclusions reached by the Department of State?

2. May a court in the United States decline on the ground of the federal act of state doctrine to permit a United States national, as defendant, to offset against the claim of a foreign government plaintiff its claim for compensation for property confiscated by that foreign government, where the Executive Branch, through the Department of State, has made a finding that the foreign policy interests of the United States do not require application of the act of state doctrine and has expressed the view that the act of state doctrine should not be applied?

3. Do the words "right to property" in the Hickenlooper amendment include intangibles, such as a claim for compensation for confiscated property, or is the statute limited to tangible personal property, such as sugar or oil?

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* Figures and letters in parentheses identify the pages of the Appendices (App.) to this petition and of the Joint Appendix (JA) filed in connection with petitioner's earlier Petition for Writ of Certiorari herein, No. 846, October Term, 1970, to which reference is made.

4. In an action instituted in a court of the United States may the foreign government plaintiff contest, on the basis of its own municipal laws, a United States defendant's claim for compensation for its confiscated property when the validity and amount of that claim has been finally determined by the Foreign Claims Settlement Commission?

5. When a court in the United States has adjudicated that a confiscation is in violation of international law, may it thereafter decline, on the ground of the act of state doctrine, to follow its own decision in a subsequent case brought by the same plaintiff against a different United States national, involving the same foreign government and the same foreign acts and laws?

Statutes Involved

The Foreign Assistance Act of 1964, as amended, 22 U.S.C. § 2370(e)(1), (2) (Hickenlooper Amendment), Fundamental Law of Cuba, Article 24, Law No. 851 of Cuba and the International Claims Settlement Act of 1949, as amended, 22 U.S.C. §§ 1643-1643k, 1623(h), are set forth in Appendix F.

Statement

Petitioner, a national banking association, has a claim against the Government of Cuba, based on the taking of petitioner's property in September 1960. The validity of this claim was determined by the Foreign Claims Settlement Commission (the "Commission") pursuant to Title V of the International Claims Settlement Act of 1949, as amended, and the Commission determined the amount of the claim to be $4,863,731.04 plus interest after deduction of petitioner's recoveries against Cuba, including the offset hereafter described.

Respondent is an instrumentality of the Government of Cuba acting in this case for and on behalf of Cuba[1]; for

[1] The district court found that "There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". (App. E-4) Respondent "at various times has argued that defendant's (petitioner's) claim against the Cuban Government cannot be asserted against Banco Nacional, an entirely separate entity." (App. E-4 n. 3) This argument was renewed on appeal, but the court below did not pass on it.

purposes of this petition the plaintiff-respondent is the Government of Cuba. It commenced this action in the District Court for the Southern District of New York to recover $2,347,000, alleging federal jurisdiction under 28 U.S.C. § 1332. The claim arose out of petitioner's withholding from respondent the excess proceeds of collateral originally pledged by respondent on a loan to respondent by petitioner.

Petitioner asserted an offset in the amount of the value of its seized Cuban property. The district court, Judge Bryan, held this offset proper; and, upon the stipulation of the parties that the offset exceeded the amount of respondent's claim, entered judgment for petitioner.

Respondent appealed and the court of appeals, holding that allowance of the offset was error, reversed.

Petitioner then sought a writ of certiorari from this Court, and the Solicitor General, transmitting a letter of the Department of State (App. C-2), filed a memorandum suggesting that this Court remand the case to the court of appeals (App. C-1). This Court granted the writ, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the views expressed by the Department of State. On remand, the majority of the same panel of the court below (Judge Hays dissenting) reinstated its earlier judgment notwithstanding the Department's views. The majority opinion by Chief Judge Lumbard (in which District Judge Blumenfeld, sitting by designation, concurred) appears at App. A-2; the dissenting opinion by Circuit Judge Hays at App. A-11.

There is no dispute as to the facts. From August, 1915 until September, 1960, petitioner maintained branch offices in Cuba, pursuant to Section 25 of the Federal Reserve Act and Cuban law. (JA 14a; 17a; 25a) On September 16, 1960, petitioner operated eleven branches in Cuba (JA 14a; 25a).

In 1958, Cuba applied to petitioner for a loan for government purposes. Petitioner made the loan, in the initial principal amount of $15,000,000, secured by obligations of the United States Government and the International Bank for Reconstruction and Development (the "collateral"). The loan was made, and the collateral received in pledge, at petitioner's head office in New York City on July 8, 1958.

At the request of Cuba, the original one year maturity was extended for another year. In July 1960, Cuba proposed to pay $5,000,000 on account of principal, against release to it of a proportionate amount of the collateral (which was done), and to defer payment of the balance for a further period of one year from July 8, 1960. Petitioner agreed to this proposal upon the express proviso that the continuance of the loan was predicated upon a continuance of conditions then existing in Cuba. Documentation covering the extension was sent to Cuba for execution, but was never returned.

More or less simultaneously, Cuba enacted Law of Nationalization No. 851 (App. F-4) and thereafter on September 16, 1960, the Cuban Government seized petitioner's branches in Cuba and turned them over to respondent, which is still in possession and control of those properties. The Fundamental Law of Cuba (App. F-8) and Cuban Law No. 851 (App. F-6) specify that compensation shall be paid for property taken by the Cuban Government, but no compensation has been paid to petitioner.

As the $10,000,000 loan was then due, petitioner exercised its right to sell the collateral for the loan, which yielded proceeds of $11,892,448.41, according to petitioner's records (JA 62a), from which principal and interest due were deducted, leaving an excess of $1,810,081.51. Although the amount of petitioner's offset is in dispute, the parties have stipulated for the purpose of this action that the amount of the petitioner's claim exceeds the amount of

the excess collateral. (The Commission later determined the value of the seized branches to be $9,510,000.00.)

Petitioner's claim is asserted as a defensive counterclaim only; that is, as an offset against the claim for excess collateral. Petitioner seeks no affirmative judgment against Cuba in this action.

Reasons for Granting the Writ

This case raises important questions as to (1) the federal act of state doctrine; (2) the effect of the view expressed by the Department of State that the doctrine should not be applied in this case, based upon the Department's finding that the foreign interests of the United States do not require application of the doctrine; (3) the so-called Hickenlooper Amendment (22 U.S.C. § 2370(e)(2)); and (4) the International Claims Settlement Act of 1949, as amended (22 U.S.C. §§ 1643-1643k, 1623(h)) that have not been, but should be, settled by this Court. A constitutional issue is raised by the determination below that this petitioner should be denied the right to offset a liability found to exist (1) in another case in the same court (*Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2nd Cir. 1967), *cert. den.,* 390 U.S. 956) involving the same plaintiff and the same foreign act of state, and (2) in respect of the parties to this action by the Foreign Claims Settlement Commission pursuant to the International Claims Settlement Act of 1949, as amended. The decision below is in conflict with decisions of this Court. *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955); *Republic of Mexico* v. *Hoffman,* 324 U.S. 30 (1945); *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931).

Moreover, the decision so far departs from the prior decisions of the court below (*Banco Nacional de Cuba* v. *Farr, supra; Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.,* 210 F.2d 375 (2nd Cir. 1934), as to require an exercise of this Court's power of supervision.

Summary of Argument

The court of appeals disregarded the mandate of this Court to reconsider its views in light of the views of the Department of State. Since the Executive, acting through the Department of State, has made it known to this Court that the foreign policy of the United States does not require application of the act of state doctrine in this case, the continued application of the doctrine below was erroneous and denied petitioner due process of law. Furthermore, Congress, in the Hickenlooper Amendment, has directed that the act of state doctrine not be applied as a bar to petitioner's claim. Even if the Executive and Legislative Branches had not acted, enforcement of petitioner's counterclaim is not affected by the act of state doctrine, under the rule stated by this Court in *Republic of China, supra.*

Argument

I

The Decision of the Court Below is not Responsive to the Mandate of this Court. By order dated January 25, 1971, this Court vacated the judgment of the court of appeals, rendered July 16, 1970, and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General." (App. B).

The court below recognized that the views of the Department of State were (1) "that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine." (App. A-4); (2) that "the foreign policy interests of the United States do not require the application

of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances." (App. A-4); and (3) that "the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." (App. A-4).

The majority of the panel, however, disagreed with those views, and declined, on the ground of the act of state doctrine, to adjudicate the validity of petitioner's defensive counterclaim or offset. (App. A-11).

In his dissenting opinion, Judge Hays pointed out that "by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision," the majority "is usurping the same executive prerogative which it is the function of that doctrine to preserve." (App. A-12).

The posture of this case, when it first came to the court of appeals, was that the district court had sustained petitioner's counterclaim on the merits. The court of appeals did not disturb that determination, but reversed on the ground that the act of state doctrine precluded it, and should have precluded the district court, from making an adjudication on the merits. The Department of State then expressed the view that the act of state doctrine need not and should not be a bar to petitioner's counterclaim. This Court's direction to reconsider the case in the light of those views has been ignored by the majority of the court below, which, notwithstanding the views of the State Department, has persisted in its own conclusion that the act of state doctrine operates as a bar.

By declining to give effect to the Executive decision, the majority failed to comply with the mandate of this Court. The views of the Executive were transmitted to this Court by the Solicitor General and this Court thereupon directed the court below to reconsider its earlier decision in the light

of those views; it did not authorize a reconsideration of the views themselves.

Whether or not the majority, in making an independent evaluation of the State Department's views, was "usurping the executive prerogative" (to use Judge Hays' phrase), it was error to disregard those views when this Court had ordered reconsideration in their light.

II

The Majority Below has Usurped an Executive Prerogative. Judge Hays pointed out in his dissenting opinion that the majority of the court below engaged in "precisely the kind of judgment which the act of state doctrine has removed from judicial determination." (App. A-11) In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), the Executive Branch suggested to this Court that the adjudication there, by the same court of appeals, was an invasion, however inadvertent, of the field of foreign relations reserved to the Executive by the Constitution.[2] In this case, the foreign policy determination has been made explicitly by the Executive[3] and that determination has been adopted by this Court as a guideline for the court below. 400 U.S. 1019. In these circumstances, the insistence of the majority below upon making an independent evaluation of the merits of the Executive's foreign policy determination

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[2] "Assuming that judicial consideration of the validity of a foreign act of state should not be foreclosed in the unusual case where the Executive formally expresses its judgment that the reasons for the doctrine do not call for recognition of the foreign act, the plain fact, we submit, is that there has been no such expression in this case. Nor should this Court hold, for the first time, that executive silence regarding the act of state doctrine is equivalent to executive approval of judicial inquiry into the foreign act." (Brief for the United States as Amicus Curiae)

[3] "We find . . . that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances. . . . The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." (App. C-6, 7)

is indeed a usurpation of the very Executive prerogative which it is the function of the act of state doctrine to preserve.

The first duty of the Judicial Branch is to adjudicate the cases and controversies that come before it. U.S. Constitution, Art. 3, § 2. It must discharge that obligation unless to do so would frustrate another constitutional dictate, in this instance, assignment of the conduct of the foreign relations of the United States to the Executive and Legislative Departments of Government. Mr. Justice Harlan's opinion in *Sabbatino* makes clear that deference to the Executive is the essential reason for the Judicial Branch's declination to execute its constitutional mandate to determine cases and controversies before it in accordance with the principles of law, including international law[4].

Judicial deference is predicated upon the presumption that any adjudication which so much as calls in question the validity of a foreign act of state may embarrass the Executive in the conduct of the foreign relations of the United States and thus be an impermissible invasion of our own government's sovereignty. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2nd Cir. 1949); *Sabbatino, supra.* But this presumption may be rebutted, and was so rebutted in the last *Bernstein* case, 210 F.2d 375 (2nd Cir. 1954). *Bernstein* was a case where a determination by the Executive within its own special field of competence—the conduct of the foreign relations of the United States—provided guidance to the Judicial Branch by rebutting the presumption, and thus removed the bar of the act of state doctrine.

It is evident from the opinion on remand that the majority of the court of appeals refused to give effect to the State Department letter because they disagreed with the content of the letter. The extensive discussion of the facts in *Bernstein,* and the effort to distinguish this case, reveals that court's preoccupation with considerations that

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[4]In *The Paquete Habana,* 175 U.S. 677 (1900), at 700, this Court said:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

might properly be weighed by the Executive in determining American policy on a political matter. The opinion is an apparent effort by the court of appeals to correct or revise the Executive determination; but nowhere does the majority deal with the legal issue—the effect of the official expression of the Executive's views on a political question dealing with foreign relations.

Respondent argued, and evidently persuaded the majority below, that "the Act of State doctrine has little to do with considerations of fairness and equity; it is based on reasons of state which have been set forth by the Supreme Court in *Sabbatino.*" (Brief by Plaintiff on Remand, p. 5). But this position cannot be maintained in the context of this litigation. Respondent's argument that the applicability of the act of state doctrine is a "political question" is answered by the Executive's explicit determination that the foreign policy interests of the United States do not require application of the doctrine and that the doctrine should not be applied. Such Executive determinations are followed by the courts. *Cf. Republic of Mexico* v. *Hoffman,* 324 U.S. 30 (1944); *Ex parte Peru,* 318 U.S. 578 (1943); *United States* v. *Belmont,* 301 U.S. 324 (1936). Respondent's argument that "only a court can determine which political questions and which foreign relations questions are justiciable" (Respondent's Brief in Opposition to Petition for Certiorari, November 13, 1970, at p. 16) is answered by this Court's mandate to the court of appeals to reconsider this case in the light of the views expressed by the Executive. 400 U.S. 1019.

Inasmuch as the Executive Branch has resolved the political questions raised by this case, and this Court has directed that the case be considered in the light of that resolution, it was error for the majority below to decline to adjudicate petitioner's counterclaim on the merits.

As noted by Judge Hays, in dissent, the fundamental purpose of the act of state doctrine is to preserve the execu-

tive prerogative in the field of foreign policy. The majority below has perverted this purpose by, in effect, making the government of Cuba rather than the Government of the United States the beneficiary of the doctrine.

III

The Legislative Branch has Determined that the Act of State Doctrine should not be Applied in Cases of this Nature. In the district court, Judge Bryan determined this case on the merits as, in his view, he was required to do by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2730(e). "Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959 by an act of a foreign state 'in violation of the principles of international law, including the principles of compensation.'" (App. E-6) 270 F.Supp., 1007. In so doing, the district court gave full effect to the basic desire of Congress to provide such remedies as might be available to victims of foreign confiscations that violated international law, as expressed in the literal words of the statute. It has been determined that the takings under Cuban Law No. 851 violated international law. *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2nd Cir. 1967), *cert. den.* 390 U.S. 956.

The court of appeals, indulging in a strained interpretation of congressional intent, which has been severely criticized (R. B. Lillich, *International Law, 1970 Survey of New York Law,* 22 Syracuse L. Rev. 269-80 (1971); Note, 11 Va. J. Int'l Law 406 (1971); *compare* Hearings before the House Committee on Foreign Affairs on H. R. 7750, 89th Cong. 1st Sess. (1965), 1306 (Olmstead letter) (Appendix G)) denied effect to the plain words of the statute. In consequence, the court of appeals declined to consider the merits of the petitioner's offset and counterclaim, reversed the district court and directed the entry of judg-

ment on the merits in favor of Banco Nacional de Cuba. This decision by the court below was erroneous in two respects which, we submit, require attention and correction by this Court.

A. The constitutionality of the Hickenlooper Amendment is called into serious question by the construction given it by the court below. That court read the statute as if it provided that a court of the United States was required to adjudicate on the merits only those cases that involved title or other rights to *tangible personal* property that had found its way into the United States and in which a party asserted a claim of title or other right to such property or its proceeds. The simple word *property,* used in the amendment, does not support such a reading. (App. G-3) So read, the statute would require adjudication on the merits only on claims asserted by the owners of particular commodities such as sugar, tobacco or oil, or the proceeds of any of them, and would deny justice to the owners of other classes of property, such as real estate, negotiable instruments or intangibles, or the proceeds of any of them. Any such discriminatory enactment would be constitutionally unsound as irrational, a denial of equal treatment to former owners of property in Cuba and a denial of due process of law to petitioner. The court of appeals erred in interpolating by implication a condition which, to say the least, would raise a grave question as to the constitutional validity of the statute. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931), at 492.

B. The court below's reading of the Hickenlooper Amendment produces anomaly in the law and an inconsistency of decision within the same circuit which should be corrected by this Court. The court below's decision in *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2nd Cir. 1967), *cert. den.* 390 U.S. 956, is a holding that Cuban Law No. 851 violated international law and warranted judicial relief to a United States national aggrieved by Cuban

action under it. The decision of the same court in this case now denies judicial relief to a United States national aggrieved by action under that same Cuban law, on the ground that the act of state doctrine precludes judicial examination. This pushes the act of state doctrine beyond the bounds of rationality, and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19(1)(b), Rules of the Supreme Court of the United States.

IV

The Act of State Doctrine is not Applicable to Cases of this Nature. This Court decided in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955), that considerations of fairness and equity require allowance of a counterclaim in reduction or extinguishment of the claim of a foreign sovereign suing in our courts. Cuba seeks to avoid its obligation to plaintiff in this case just as the sovereign sought to avoid its obligation in *Republic of China.* In each case plaintiff's reliance is on the special privileges of a sovereign. Those privileges are waived when the sovereign voluntarily enters our courts, to the extent that the sovereign then becomes subject to defenses against its claim. *Republic of China, supra.*

The defense of setoff, and the counterclaim, in this case rest on the elementary and universal legal principle that he who takes another's property must pay for it: the Government of Cuba cannot deny that obligation. Although the courts below, and a large part of the briefs of counsel, gave lengthy consideration to the legality of the taking by Cuba of petitioner's eleven branches in 1960, the merits of petitioner's claim do not depend on a determination that the taking was invalid or ineffective to pass title. But petitioner does insist that the taking, legal or illegal, resulted in an obligation to pay fair compensation, and this is so under Cuban law, under American law and under international

law. Fundamental Law of Cuba, Article 24; U.S. Constitution, Amendment V; Hackworth, DIGEST OF INTERNATIONAL LAW, Vol. III, 656, 662; authorities collected in *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 863, n. 11, 12. The validity and amount of petitioner's claim has been finally determined by the Foreign Claims Settlement Commission, *In the Matter of the Claim of First National City Bank,* F.C.S.C. Dec. No. CU-3835, November 14, 1969.

The fundamental question raised by this case is one of fairness. A foreign government has entered our courts as a suitor to seek a money judgment. The defendant asserts countervailing claims that would curtail the amount of the plaintiff's recovery if the plaintiff were a private litigant or the Government of the United States itself. The court below has held that the act of state doctrine prevents this petitioner from asserting a claim which would fairly curtail the recovery of respondent in this case. That is a brutal application of a discretionary rule. As Chief Justice (then Judge) Burger said in dissent in *Pons* v. *Republic of Cuba,* 294 F.2d 925 (D.C. Cir. 1961), at 927,

> ". . . I do not think we should carry the act of state doctrine to the point where we permit a foreign state to come into our courts as a suitor and secure equitable relief on better or different terms than those available to an American litigant in the same courts."

This rationale is consistent with the view expressed in *United States* v. *National City Bank,* 83 F.2d 236 (2nd Cir. 1936), *cert. den.* 299 U.S. 563, at 238, as follows:

> "If a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect of a setoff or counterclaim properly assertable as a defense in a similar suit between private litigants."

The majority below has disregarded the mandate of this Court; it has invaded the province of the Executive Branch; it has distorted the directive of the Legislative Branch as set forth in the Hickenlooper Amendment and has disregarded action under the International Claims Settlement Act; it has deprived petitioner of rights granted to other United States nationals aggrieved by this same respondent under this same Cuban law in circumstances that are pragmatically indistinguishable from this case. The decision of the majority so far departs from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. Rule 19, Rules of the Supreme Court of the United States.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 16, 1971

APPENDIX A

Opinion, Dated April 27, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 798, 799—September Term, 1970.
(Argued March 18, 1871 Decided April 27, 1971.)
Docket Nos. 32533, 33864

BANCO NACIONAL DE CUBA,
Plaintiff-Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Frederick vanP. Bryan, *J.*, holding the act of state doctrine inapplicable and granting defendant's motion for summary judgment on its counterclaim against plaintiff. After our reversal and remand to the District Court, the Supreme Court remanded this case to us for reconsideration in light of the views of the Department of State.

We adhere to our prior decision and reverse and remand with directions.

* Sitting by designation.

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LUMBARD, *Chief Judge*:

This case comes to us on remand from the Supreme Court for our reconsideration in light of the views of the Department of State expressed subsequent to our original decision which was filed on July 16, 1970. *Banco Nacional de Cuba* v. *The First National City Bank of New York,* 431 F.2d 394 (2d Cir. 1970). For the reasons stated below, we adhere to our prior decision and reverse and remand to the district court.

In the original action, Banco Nacional de Cuba brought suit against First National City Bank of New York in the Southern District. After the Castro government of Cuba had expropriated First National City's properties there pursuant to Cuban Law No. 851, First National City had sold collateral securing a ten-million-dollar loan it had made to Banco Nacional prior to the change in Cuba's government. From the sale of that collateral, First National City had received an amount—conceded to be at least $11,892,448 and perhaps as much as $12,412,000—which was substantially in excess of that required to discharge the ten-million-dollar principal sum and the four per cent interest thereon. Banco Nacional's suit was to recover the excess realized on that sale.

In the district court, First National City raised a series of counterclaims and setoffs based principally on the contention, that, since the Cuban government had confiscated its properties in Cuba in violation of international law, it

was entitled to retain the excess on the sale of the collateral as an offset against the value of its confiscated properties. Judge Bryan in the Southern District granted summary judgment to First National City. *Banco Nacional de Cuba* v. *The First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

On appeal, we reversed the district court's judgment, holding that Cuba's confiscation of First National City's properties in Cuba was an act of state and that under *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the act of state doctrine foreclosed judicial inquiry into the validity of that confiscation under international law. We held further that the Hickenlooper Amendment to the Foreign Assistance Act of 1964[1] did not apply here so as to defeat the act of state doctrine and thereby to give a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we concluded that allowing First National City its claimed offset against the allegedly unlawful expropriation was error; and we remanded to the district court for a factual finding as to the amount by which the proceeds of the sale of the collateral exceeded the amount then owing on the loan—which excess we directed should then be paid to Banco Nacional.

First National City petitioned for a writ of certiorari on October 13, 1970; and on November 17, 1970, the Legal Advisor to the Department of State wrote a letter to the Supreme Court expressing the views of that Department with respect to this case. The State Department's letter is set out in full in an appendix to this opinion. By order dated January 25, 1971, the Supreme Court granted certiorari and remanded the case to us without taking any position on the merits. The Supreme Court's order stated in full:

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[1] 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6 1965).

> "846 First National City Bank v. Banco Nacional de Cuba. The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case." 39 U.S.L.W. 3321 (January 26, 1971).

Upon reconsideration, we see no reason to change our initial decision on this appeal.

Basically, the State Department's letter of November 17 expresses the view that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine. It suggests that this Court is relieved from any restraint upon the exercise of its jurisdiction to adjudicate First National City's counterclaim arising out of the confiscation of its Cuban assets. The letter states that in this case

> "the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.
>
> The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

First National City argues that this letter constitutes the requisite statement by the Executive Branch which under our decision in *Bernstein* v. *N.V. Nederlandsche Amerikaansche, etc.,* 210 F.2d 375 (2d Cir. 1954), relieves the courts from applying the act of state doctrine to bar examination of the validity of the law in question. Because the interpretation of *Bernstein* will be crucial to our determination of the instant case, we set forth the background of *Bernstein* in some detail.

That case involved the alleged confiscation of the property of a single plaintiff, a Jewish German national, by the Nazi German government between 1937 and 1939. Plaintiff alleged that he was compelled by officials of that government, acting through threats of bodily harm, indefinite imprisonment, and death for plaintiff and his family, to assign his property to the German government. Beginning in 1946 the plaintiff sought to attach and recover some of the proceeds of his former property in a suit brought in a state court in New York and removed to the federal district court. In the first *Bernstein* case, *Bernstein* v. *Van Heyghen Freres Societe Anonyme,* 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), we held, in an opinion by Judge Learned Hand, that the act of state doctrine prevented us from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi government; and we therefore affirmed the district court's dismissal of the complaint. However, in the course of his opinion, Judge Hand said that it was a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned does not apply." 163 F.2d at 249. After full consideration, we concluded that the Executive Branch had not in fact acted to relieve the courts of the restraint imposed by the act of state doctrine.

In the second *Bernstein* case, the same plaintiff brought a conversion action against another defendant—a Dutch

corporation which, in participation in a plan with officials of the Nazi government, had confiscated and converted his stock in a German liability corporation. In that case, we reaffirmed our holding in the first *Bernstein* case that, because of the lack of a definitive expression of Executive policy, the act of state doctrine prevented judicial examination of official acts of the Nazi government. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2d Cir. 1949). We did remand the case for the purpose of allowing the plaintiff to allege, if he could, that his property had been seized by persons acting in a private capacity; but we ordered him to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government.

Following that decision, the State Department issued a press release quoting a letter from its Acting Legal Advisor. As the release stated, that letter

> "repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

When the case came before us again, we stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." 210 F.2d 375, 376 (2d Cir. 1954).

First National City argues that *Bernstein* requires that we change our prior decision in the instant case, as we did there, to conform with the State Department suggestions. It contends that since the Executive has now written a "Bernstein letter" exercising its prerogative in the area of foreign policy and suggesting that the act of state doctrine is inappropriate in this case, the policies underlying that doctrine, to which the Supreme Court gave crucial weight in *Sabbatino,* are not present here. According to First National City, judicial resolution of the issue raised by this claim would involve no encroachment on the Executive's prerogatives in the area of foreign affairs; there would be no invasion of the foreign government's sovereignty since Cuba itself sought the process of United States law; and there would be no burden on international trade, nor risk to innocent purchasers, since the sole question is whether one party has defenses that fairly curtail the recovery sought by the other party. Hence, says First National City, this Court should not apply the act of state doctrine here.

First National City contends further that without the bar of the act of state doctrine, we can and must hold in its favor—that it is entitled to set off against Banco Nacional's claim for relief such amount as may be due and owing it from the Cuban government as compensation for its confiscated Cuban property. Its argument in this regard runs as follows: In *Sabbatino,* we held that Cuba's seizures of property of United States nationals pursuant to Cuban Law No. 851 were in violation of international law. *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir. 1962). That substantive determination was not questioned by the Supreme Court in reversing us in *Sabbatino,* for the Supreme Court decided only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign. When this restraint was removed by the Hickenlooper Amendment, this Court was "unable to find any convincing reason, based on argument or new authority, for altering our holding in the original

appeal," 383 F.2d at 183; and so we reaffirmed our previous holding that Cuban taking was invalid under international law. *Banco Nacional* v. *Farr,* 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 956 (1967). When the instant case came here, we felt that the restraint on an examination of validity, recognized in the Supreme Court's decision in *Sabbatino,* precluded the result we had reached in *Farr* because the Hickenlooper Amendment did not apply. Now, says First National City, the situation is altered by the subsequent expression of views by the State Department; and hence, in conformity with our decision in *Bernstein,* we should respond by following our decision on the merits in *Farr,* with respect to the same Cuban law.

We disagree. First National City's arguments are based wholly on the assumption that the so-called *Bernstein* exception to the act of state doctrine applies here since the State Department has written a letter. We feel that that assumption is erroneous. *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts.

As shown above, the facts in *Bernstein* were most unusual, to say the least, and bear no resemblance to those in the instant case. The acts of state there were performed by a German government with which this country had gone to war and which was no longer in existence at the time of the State Department's letter. Here, on the other hand, we have never been at war with Castro's Cuban government, and that government is both extant and recognized by the United States. Again, unlike the situation here, the State Department's letter in *Bernstein* was written during the aftermath of a great world war; and the Nazi government's actions, such as those of which Bernstein complained, had been condemned throughout the world as crimes against humanity. Furthermore, the letter in *Bernstein* went so far as to indicate that it was the affirmative policy of our govern-

ment to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs.

The Executive itself seems to have recognized the uniqueness of *Bernstein*, for the Solicitor General's Brief as Amicus Curiae before the Supreme Court in the *Sabbatino* case states:

> "The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed, at the time of the *'Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of the reparations settlement."

There is still another important distinction between *Bernstein* and the case at bar. In *Bernstein*, as should be clear, the balance of equities was almost entirely on the side of the party opposing application of the act of state doctrine, the plaintiff, whereas here, as we found in our prior decision in this case, the contrary is true, since First National City is seeking a windfall at the expense of other creditors. 431 F.2d, at 404 n. 18.

In actual practice, as the Solicitor General's Amicus Brief in *Sabbatino* also recognizes, the *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a "Bernstein letter" has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been

followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed. *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd,* 376 U.S. 398 (1964); *Kane* v. *National Institute of Agrarian Reform,* 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd,* 153 So. 2d 40 (Fla. App. 1963).[2] The Supreme Court has never passed on the validity of the *Bernstein* exception; indeed, in *Sabbatino* it carefully avoided making any such determination. 376 U.S. at 420.

Furthermore, the Court in *Sabbatino* seemed to recognize one of the distinctions described above between a *Bernstein*-type case and a case such as the one at bar. In discussing when the act of state doctrine should be applied, the Court stated that "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, . . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling

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[2] The *Bernstein* case has, in a few other instances, been cited, but not in relevant situations. For example, in *Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (2d Cir. 1956) and *Republic of Iraq* v. *First National City Bank,* 241 F. Supp. 567 (S.D.N.Y. 1965), the case was cited, although no Bernstein letter had been filed and the issue in the cases involved property located in the United States and hence not subject to the Act of State doctrine. In a few other instances the *Bernstein* case has been mentioned in passing, merely as an exception to the act of state doctrine. *Banco Nacional* v. *Farr,* 243 F. Supp. 957 (D.C.N.Y. 1965); *Palicio* v. *Brush,* 256 F. Supp. 481 (D.C.N.Y. 1966); *Wyman* v. *United States,* 166 F. Supp. 766, 769 (Ct. Cl. 1958). In *Menendez Rodrigues* v. *Pan American Life Insurance Co.,* 311 F.2d 429 (5th Cir. 1962), the court treated the correspondence referred to in our decision in *Sabbatino,* as a Bernstein letter; but, as is noted above, our decision in *Sabbatino* was reversed by the Supreme Court.

legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. It is clear that the confiscation of First National City's property in Cuba by the extant and recognized Cuban government comes within this holding, and the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in such cases.

For these reasons, we conclude that *Bernstein* is best left narrowly limited to its own peculiar facts and that, despite the State Department's letter of November 17, 1970, the exception to the act of state doctrine created by that case is inapplicable to the case at bar. Rather, we still find persuasive those cogent policy reasons for applying the doctrine which were articulated by Mr. Justice Harlan in *Sabbatino* and set forth in our prior opinion at 431 F.2d 397-99. Since we hold that the State Department's letter here does not bring this case within the narrow *Bernstein* exception, it is plain that that letter does not relieve us from applying the act of state doctrine to bar examination of the validity of the Cuban expropriation of First National City's property there.

Accordingly, we adhere to our prior decision and reverse and remand this case for further proceedings consistent with that decision and this.

APPENDIX

[See Appendix C-2, *Infra*]

HAYS, *Circuit Judge* (dissenting):

By refusing to apply the exception to the act of state doctrine announced by this court in the third *Bernstein* case, *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the majority is engaging in precisely the kind of judgment which the act of state doctrine has removed from judicial determination.

The majority's attempt to distinguish *Bernstein* shows a misapprehension of the basis upon which the *Bernstein* exception was formulated. *Bernstein* was a per curiam opinion in which this court set forth part of the text of a State Department letter. The court, making no independent evaluation of the letter itself, then stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Id.* at 376. Considerations such as the acts of the Nazi government, the fact that we were at war with the government in question, and the fact that that government no longer existed, all used by the majority to distinguish *Bernstein,* were set forth not by the court but by the State Department in its letter. Unless the majority wishes to overrule *Bernstein,* it must accept the *Banco Nacional* letter as an expression of Executive Policy and go no further. In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 420 (1964), the Court held that there had been no expression of Executive Policy.

More fundamental than a mere lack of conformity with *Bernstein,* however, is the fact that the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. The recognition of this conflict is the very reason for the *Bernstein* exception. The fundamental premise behind the act of state doctrine is that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1918). It is not the function of the courts to choose between competing foreign policy considerations and conclude that

Nazi Germany is "bad" and that Cuba is "good." The attitude of the United States toward foreign powers must be left, as in *Bernstein,* to the decision of the other branches of government. As the Court said in *Sabbatino,* in discussing the related issue of a judicial determination of the right of a foreign country to sue in our courts, "[t]his Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence. . . ." *Banco Nacional de Cuba* v. *Sabbatino, supra* at 410. The majority has undertaken just such an assessment and, in doing so, ignores both the exception to the act of state doctrine in *Bernstein,* and the fundamental purpose of the doctrine itself. I must dissent from what I consider to be a deviation from our judicial function.

APPENDIX B

Order, Dated and Entered January 25, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

No. 846

FIRST NATIONAL CITY BANK, *Petitioner*

v.

BANCO NACIONAL DE CUBA

ORDER

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case.

APPENDIX C

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 846

FIRST NATIONAL CITY BANK, *Petitioner*

v.

BANCO NACIONAL DE CUBA

MEMORANDUM

At the request of the Department of State, I am transmitting herewith a letter signed by The Legal Adviser of the Department of State expressing certain views of that Department with respect to this case.

The Court may wish to remand this case to the court of appeals for that court's further consideration in light of these views of the Department of State.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General

NOVEMBER 1970.

APPENDIX

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

NOVEMBER 17, 1970

Honorable E. Robert Seaver
Clerk of the Court
United States Supreme Court

Dear Mr. Seaver:

The case of *First National City Bank* v. *Banco Nacional de Cuba* is before the Supreme Court on petition for a writ of *certiorari*, No. 846 filed October 13, 1970. The case involves a claim by Banco Nacional for excess collateral it had pledged with City Bank to secure a loan and a counterclaim by City Bank, up to the amount claimed by Banco Nacional, based upon Cuba's expropriation, without compensation, of property of City Bank in Cuba in 1960.[1] The Court of Appeals for the Second Circuit held that the exception to the Act of State doctrine created by 22 U.S.C. § 2370(e)(2)[2] did not apply to City Bank's claim against

[1] The District Court determined that Banco Nacional and the Government of Cuba are one and the same for purposes of this litigation.

[2] "(2) Notwithstanding any other provision of law, no court in the Unted States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim or title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be

Cuba and that the Act of State doctrine, as expressed by the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), barred adjudication of City Bank's counterclaim.

The Department of State believes this second holding involves matters of importance to the foreign policy interests of the United States and requests that our views be conveyed to the Supreme Court.[3]

The Executive's role in suggesting that the act of state doctrine should not be applied with respect to a certain case or class of cases has been recognized both by the Department of State and in court decisions. This role, the so-called *Bernstein* exception to the act of state doctrine as applied by United States courts, was first clearly established in *Bernstein* v. *N.V. Nederlandsche Amerikaansche, Etc.*, 210 F.2d 375 (2nd Cir. 1954), where the court reversed its earlier holding, 173 F.2d 71 (2nd Cir. 1949), that the act of state doctrine precluded the court's adjudication of the validity of certain acts of the (Nazi) German Government. The basis for this reversal was a statement by Jack B. Tate, Acting Legal Adviser, Department of State, indicating that

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applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (Foreign Assistance Act of 1965, Sec. 620(e)(2), 22 U.S.C. §2370(e)(2)).

[3] We regret that our views could not have been brought to the attention of the lower courts. Unfortunately, it was only after the not-yet-published opinion of the Second Circuit Court of Appeals was handed down that the question of the appropriateness of State Department action arose, since it did not become clear until that time that the Sabbatino Amendment would be considered inapplicable. No formal request for a statement by the Department was made in this case until October 14, 1970, one day after the petition for writ of *certiorari* was filed.

> "The policy of the Executive, with respect to claims asserted in the United States for restitution of such property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

210 F.2d at 376. Thus the Executive had indicated that the act of state doctrine need not be applied in a certain class of cases; the applicability of the statement was not limited to the *Bernstein* case.

In *Banco Nacional de Cuba* v. *Sabbatino, supra,* the Supreme Court held that the act of state doctrine precluded the examination of the validity of the act of a foreign sovereign within its own territory, even where that act was allegedly a violation of international law. 376 U.S. at 436-37. The ruling was based on the Court's recognition of the Executive's prerogatives in the area of foreign affairs; it found the act of state doctrine "arising out of the basic relationships between branches of government in a separation of powers." *Id.* at 423. However, the Court specifically avoided ruling on the validity of the *Bernstein* exception. *Id.* at 436.

While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.

Recent events, in our view, make appropriate a determination by the Department of State that the act of state

doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country.

The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U.S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case—that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff—is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, more-

over, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

Sincerely yours,

JOHN R. STEVENSON.

APPENDIX D

Opinion, Dated July 16, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 480 and 481—September Term, 1969.

(Argued March 23, 1970 Decided July 16, 1970.)

Docket Nos. 32533 and 33864

BANCO NACIONAL DE CUBA,

Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Appellee.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vanP. Bryan, *J.*, granting defendant-appellee's motion for summary judgment on its counterclaim against plaintiff-appellant. Reversed and remanded with directions.

VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz, Boudin & Standard, Leonard B. Boudin, and Kristin Booth Glen, on the brief), *for appellant.*

* Sitting by designation.

HENRY HARFIELD, New York, N. Y. (Shearman & Sterling, Wm. Harvey Reeves, and John J. Madden, Jr., on the brief), *for appellee.*

WALTER J. NEYLON, New York, N. Y., on the brief, *for Alicio Ruiz Martinez, Sr., et al., intervenors.*

LUMBARD, *Chief Judge:*

Plaintiff-appellant Banco Nacional de Cuba appeals from an order of the District Court for the Southern District of New York which granted summary judgment to defendant-appellee First National City Bank of New York (First National City) on Banco Nacional's two causes of action. Appellant has abandoned the second cause of action on this appeal, and thus only the first cause of action, which is based on the following facts, is before us on this appeal. First National City, when the Castro government of Cuba expropriated its properties there, forthwith sold collateral securing a loan it had made to Banco Nacional prior to the change in Cuba's government. The effect of Judge Bryan's order was to allow First National City to retain, as an offset against the value of its expropriated properties, the amount by which the proceeds from the sale of the collateral exceeded the amount then owing on the loan. We hold that allowing such an offset was error. The so-called Hickenlooper Amendment does not give to a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we reverse and remand to the district court for a factual finding as to the amount of the excess. Once this factual determination is made, we direct entry of summary judgment in favor of Banco Nacional on its first cause of action.

On July 8, 1958, First National City made a fifteen million dollar secured loan to Banco de Desarrallo Economico y Social (Bandes), a corporate agency of the gov-

ernment of the Republic of Cuba. Collateral for the loan was pledged by Banco Nacional de Cuba (Banco Nacional) and another Cuban government agency, Fondo de Estabilizacion de la Moneda (Fondo); this security was held in New York and consisted of bonds of the United States government and obligations of the International Bank of Reconstruction and Development.

The Castro forces seized control of the government of Cuba on January 1, 1959. Thereafter, on July 8, 1959, First National City renewed the fifteen million dollar loan to Bandes for another year. During the course of the ensuing year, two Cuban laws went into effect which resulted in the dissolution of Bandes and the succession by Banco Nacional to many of its rights and obligations, including the obligation to repay the fifteen million dollars, plus interest, to First National City. The Republic of Cuba also guaranteed that the loan would be repaid.[1]

First National City and Banco Nacional renegotiated the loan for the second time on July 7, 1960. Banco Nacional repaid one-third of the loan—five million dollars—and First National City released approximately one-third of the collateral. At Banco Nacional's request, First National City agreed not to demand repayment of the ten million dollar balance for one year.

On September 16, 1960, the Cuban militia occupied the eleven First National City branch offices in Cuba. Executive Power Resolution No. 2, issued by the Castro government the following day, formally confirmed that the branches had in fact been nationalized.[2]

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[1] The district court cited these laws as Cuban Law No. 730, February 16, 1960, and Cuban Law No. 847, June 30, 1960.

[2] Executive Power Resolution No. 2 was issued pursuant to Cuban Law No. 851, July 6, 1960. See *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 849, 861-2 (2d Cir. 1962). Executive Power Resolution No. 2 is set out in the opinion of the district court, 270 F. Supp. at 1009-1010, note 6.

First National City retaliated almost immediately. On September 20, 1960, it notified Banco Nacional that it had closed Banco Nacional's accounts as of September 17 and that it was claiming the amounts on deposit therein as an offset against the nationalization of its properties in Cuba.[3] What is more important to the present appeal, on September 21 and 22, 1960, First National City sold the collateral held in New York as security on the ten million dollar loan. First National City received from that sale an amount —conceded to be at least $11,892,448 and perhaps as much as $12,412,000—which was substantially in excess of that required to discharge the ten million dollar principal sum and the interest thereon at the annual rate of 4 per cent for the period July 8, 1960 through the time of the sale.

II.

Banco Nacional instituted suit in November, 1960, against First National City to recover the excess realized on the sale of the collateral held as security for the loan. Its complaint also set forth a second cause of action for recovery of the deposits on the Cuban banks which First National City had retained. As Judge Bryan described it, First National City's answer raised "a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches." 270 F. Supp. at 1005. Both parties moved for summary judgment on both causes of action and on the counterclaims.

As to the second cause of action, Judge Bryan granted First National City's motion for summary judgment. Banco Nacional filed a notice of appeal from that portion of his

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[3] What had happened was that a number of private Cuban banks with deposits in First National City were nationalized pursuant to Cuban Law No. 891 in October 1960, and the confiscation decree declared that Banco Nacional was to have full title to the property of those banks. Thus, First National City, in notifying Banco Nacional, referred to the accounts as Banco Nacional's.

order, but is not pressing that appeal at this time.[4] In dealing with the first cause of action, Judge Bryan denied Banco Nacional's motion for summary judgment on its claim and on First National City's counterclaim. However, as to defendant First National City's motion for summary judgment on the first cause of action and the counterclaim, Judge Bryan ruled:

> Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against [Banco Nacional's] first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

270 F. Supp. at 1011.

It is this latter holding that is before us on this appeal. After Judge Bryan's order was filed, the parties entered into a stipulation providing that the value of First National City's property which had been confiscated in Cuba exceeds any amount which Banco Nacional could be awarded

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[4] We only observe that Judge Bryan's resolution of this issue was in compliance with the decision of this court in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. den., 382 U.S. 1027 (1960). We also note that the holding that the Cuban expropriation decrees are not entitled to extraterritorial enforcement in United States courts as to property located within the United States is distinct from the question whether the act of state doctrine — absent the Hickenlooper Amendment — bars an American court from inquiry into the validity of expropriations of American property within the territory of the expropriated nation.

On this appeal, certain intervenors point out that they claim some of these deposits. The court below, in granting summary judgment to First National City on Banco Nacional's second cause of action, did not reach these claims, which we assume will be litigated below at some time.

on its first cause of action to recover from First National City the excess amount realized on the sale of the collateral.[5]

III.

First National City claims that it is entitled to retain the excess amount realized on the foreclosure of the collateral as a set-off because the Cuban government confiscated its branch banks without providing adequate compensation, and that this act was a violation of international law. Judge Bryan properly observed that under the United States Supreme Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), "inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting 'in judgment of the acts of the government of another, within its own territory.' " 270 F. Supp. at 1007. However, Judge Bryan then concluded that the *Sabbatino* decision had been legislatively overruled "for all practical purposes," by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 USC. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965). He also noted that the Hickenlooper Amendment had been held constitutional in the Southern District of New York in the sequel to the *Sabbatino* litigation, *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965); we add that the district court decision in *Farr* was affirmed in a lengthy opinion by Judge Waterman, 383 F.2d 166 (2d Cir. 1967), and that Banco Nacional's petition for a writ of certiorari in that case was denied, 390 U.S. 1956 (1968).

Judge Bryan also held that the Hickenlooper Amendment directed him, regardless of the act of state doctrine, to determine "the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state 'in

[5] This stipulation was entered for purposes of this litigation, to avoid the necessity of a trial on the value of First National City's expropriated assets located in Cuba. See 270 F. Supp. at 1010-11.

violation of the principles of international law, including the principles of compensation.'" 270 F. Supp. at 1007. Proceeding to the merits, Judge Bryan held that the confiscation of First National City's branches did violate international law because adequate compensation was not provided and because the confiscation was a reprisal evincing discrimination against nationals of the United States. 270 F. Supp. at 1007-1010. In light of this, he concluded that First National City was entitled to a set-off against Banco Nacional's claim to recover the amount left from the sale of the collateral after deduction of the principal and interest due and owing.

On this appeal, Banco Nacional makes three principal arguments. First, it claims that the act by which the Cuban government confiscated First National City's branches in Cuba was an act of state, that the Hickenlooper amendment is not applicable to the facts in this case, and thus that the district court should have followed Mr. Justice Harlan's opinion for the Court in *Sabbatino* and not inquired into the validity of the Cuban expropriation under international law.[6] Second, Banco Nacional argues that the Hickenlooper Amendment is unconstitutional.[7] Third, Banco Nacional contends, with some justification, that summary judgment on First National City's counterclaim was improper because: (1) the counterclaim was invalid procedurally in that it was directed at the Republic of Cuba, which is not an "opposing party" in the present suit under Rule 13 of the

[6] A sub-part of this argument is that, assuming the Hickenlooper Amendment applies to the facts or this case, Judge Bryan incorrectly applied international law in holding that the Cuban expropriations violated international law. However, appellant concedes that if this court holds the Amendment applicable to the case at bar, Judge Bryan's decision on this issue was in accordance with the decision of this court in *Banco Nacional* v. *Farr, supra.* 382 F.2d at 183-185; appellant states that it raises the issue only to preserve it for further appeal.

[7] Again, this issue was resolved against Banco Nacional in *Banco Nacional* v. *Farr, supra,* 383 F.2d at 178-183.

Federal Rules of Civil Procedure and the interpretations of that rule; or (2), assuming the counterclaim to be proper procedurally, Banco Nacional is not in fact liable for the obligations of the Republic of Cuba; or (3) because at the very least this latter question raised a triable issue of fact which was improperly resolved on a motion for summary judgment. Since we agree with Banco Nacional's first argument, we find it unnecessary to pass on the other contentions.

IV.

Banco Nacional de Cuba v. *Sabbatino,* 376 U.S. 398 (1964)[8] laid down a rule of federal law by which this court and all other courts are bound absent subsequent changes in the rule wrought by Congress or by the Supreme Court. In the course of his exhaustive opinion for the eight-member majority of the Court, Mr. Justice Harlan devoted considerable attention to the general problem of when domestic courts should decline to pass upon claims which draw into question the validity of the acts of foreign sovereign states. He observed that the

> "continuing vitality [of the act of state doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply

[8] Reversing *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir. 1962).

> on national nerves than do others; the less important the implications of an issue are for our foreign policy, the weaker the justification for exclusivity in the political branches."

376 U.S. at 427-8.

From this general discussion, Mr. Justice Harlan's opinion proceeds to a specific consideration of the problem posed when the courts of one nation purport to examine the validity under international law of another nation's expropriation of the property of foreign nationals. Examining the state of the international law on this question, the Court concluded that there was no extant definition of the limits of such power which could command anything approaching a substantial majority of informed opinion. *Id.* at 428. After canvassing some of the basic disagreements on the question,[9] the Court stated that "[i]t is difficult to imagine the courts of this country embarking on an adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430.

The Court's opinion also stressed that it is far wiser for the courts to defer to the Executive in the task of securing some form of compensation for citizens of the United States who have lost property through expropriation by a foreign state. The Executive can often achieve some form of general redress, whereas judicial determinations can have only an occasional impact.[10] Moreover, judicial

> "decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord

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[9] 376 U.S. at 429-430.

[10] See section VI, *infra*.

> validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might tender less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect."

Id. at 431-2. Mr. Justice Harlan also dismissed the argument that American courts should examine the validity of foreign expropriations because in doing so they would make an important contribution to the development of international law as based on "the sanguine proposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principal by those adhering to widely different ideologies." 376 U.S. at 434-5.

Accordingly, the Court held "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428. There can be no doubt that the confiscation of First National City's branch offices in Cuba by the Cuban government was such a taking of property. As such it is an act of state the validity of which the Court has directed the Judicial Branch not to examine.

V.

The analysis just presented would suffice to decide this appeal but for the enactment of the Hickenlooper Amendment by Congress. The amendment, sometimes described

during the Congressional debates as the "Sabbatino Amendment,"[11] was passed in 1964, shortly after the Supreme Court rendered its decision in *Sabbatino,* and that fact is important in interpreting the language Congress used. In pertinent part, the Hickenlooper Amendment now provides:

> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection. . . ."

Judge Bryan held that the Hickenlooper Amendment overruled the *Sabbatino* decision "for all practical purposes" and that he was therefore required to disregard the act of state doctrine and to pass on the validity of the expropriations of First National City's branches in terms of international law. Banco Nacional takes the position that Judge Bryan's reading of the Hickenlooper Amendment is far too broad. We agree.

To understand the legislative history upon which Banco Nacional relies, it is necessary to sketch briefly the facts of *Sabbatino* itself. The case involved a shipment of Cuban sugar which was to have been purchased by an American commodity broker, Farr, Whitlock & Co., from the Cuban subsidiary of an American owned firm, C.A.V. Before the

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[11] See e.g., Hearings before the Senate Committee on Foreign Relations on S. 2659, S. 2660, S. 2662, and H.R. 11380, 88th Cong., 2d Sess. (1964) at 449; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965).

shipment could leave Cuba, all of the C.A.V.'s assets in Cuba were expropriated. Thereafter, the Cuban government allowed the shipment of sugar to leave Cuba, but only after Farr, Whitlock had entered into contracts, identical to its earlier agreement with C.A.V., with Banco Para Commercio Exterior de Cuba (Banco Exterior), an instrumentality of the Cuban government. The ship carrying the sugar was then allowed to sail from Cuba to Morocco. Banco Exterior assigned the bills of lading to Banco Nacional, which in turn assigned them to Societe Generale, a French bank which acted as Banco Nacional's agent in New York, for presentation to Farr, Whitlock for payment. In some manner, Farr, Whitlock obtained possession of the bills of lading from Societe Generale without making payment upon presentation. The money which Farr, Whitlock was supposed to pay for the shipment was also claimed by C.A.V. Thus, the dispute over the right to the proceeds of the sale of the expropriated shipment of Cuban sugar was between Banco Nacional, which in the words of the Hickenlooper Amendment claimed "title or other right . . . based upon (or traced through) a confiscation," and C.A.V., an American-owned firm which had owned the sugar before the expropriation.

Sabbatino was handed down by the Supreme Court in March, 1964, and in April, 1964, Senator Hickenlooper proposed the initial version of a foreign aid bill amendment related to the case in the Foreign Relations Committee.[12] A Conference Committee rewrote the language in September, 1964, and the amended version was enacted on October

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[12] "No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an *act* of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to *acts* that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

7, 1964, as section 301(d)(4) of the Foreign Assistance Act of 1964. Pub. L. 88-633, 78 Stat. 1009, 1013. It was changed slightly and re-enacted in its present form on September 6, 1965, as section 301(d)(2) of the Foreign Assistance Act of 1965. Pub. L. 89-171, 79 Stat. 653, 22 U.S.C. § 2370(e)(2).[13]

It is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarly related to the facts of the *Sabbatino* case. At the time of the Congressional debates during 1964 and 1965, virtually all American-owned property in Cuba had been nationalized. Much of this property consisted of productive installations such as sugar plantations, fertilizer plants, mines, and oil production facilities. In light of this, when the Supreme Court in *Sabbatino* issued a ruling which would apparently permit Banco Nacional to prevail over an American-owned firm in securing the proceeds of the sale of a shipment of expropriated sugar to an American commodity broker, the phrase "thieve's market for expropriated property" came into vogue. In explaining his proposal in an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieve's market," and explained further that the Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States." 110 Cong. Rec. 19548. At another time, he said "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936. The Senator further explained:

> "[The amendment] will discourage foreign expropriation by making sure that the United States cannot

[13] For a discussion of these changes see *Banco Nacional* v. *Farr*, *supra*, 383 F.2d at 171-2, and at 171, note 5.

become a 'thieve's market' for the product of foreign expropriations.

* * * * *

One of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the United States free from litigation."

110 Cong. Rec. 19555, 19559 (1964). See also *id.* 19548, 19557.

When the Conference Committee reported the Amendment to the House of Representatives on October 2, 1964, Congressman Adair, its sponsor in the House, gave this explanation of its purpose:

"It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] *may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States* or can resist a suit by the expropriating government to seize the property."

110 Cong. Rec. 23680 (1964) (emphasis added). Senator Hickenlooper described the provision in virtually identical terms in the Senate the following day. See 110 Cong. Rec. 24076-7 (1964).

The Hickenlooper Amendment was further considered in the 89th Congress during 1965, particularly in hearings held by the House Committee on Foreign Affairs on its reenactment. The first witness at these hearings was Professor Cecil Olmstead, one of the original authors of the Hickenlooper Amendment, who represented the Rule of Law Committee—formed by a group of American companies which had suffered expropriations—in its support

for the Amendment. He first discussed *Sabbatino,* describing its effect as follows:

> ". . . [I]f the former American owners of property expropriated abroad seek to recover that property when it turns up within the United States they are denied any kind of recourse to U.S. courts, both State and Federal, even in cases in which the expropriation is uncompensated. . . . Specifically, this means that the fruits of such illegal expropriation could be marketed with impunity in the United States."

Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965), 578. See also *Id.* 579, 591, 592, 598-599, 601, 604-605, 612-615.

During Professor Olmstead's testimony, an instructive colloquy took place between Olmstead and Congressman Fraser, a member of the Committee. Mr. Fraser was interested in determining how broad the Amendment was. He asked:

> "For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.
>
> Does that situation come within the language of your amendment?
>
> Mr. Olmstead: No, sir; that would not come within it. Our amendment has no provision in its scope to

apply to property other than that actually expropriated by the foreign country itself."

• • • • •

Mr. Fraser: You are saying it would be limited solely to situations where you actually—where what [was] at issue was the title of the [expropriated] property, that is the major issue?

Mr. Olmstead: Yes."

There followed a page of discussion about ore or oil from an expropriated mine or well coming back into this country, and Professor Olmstead then concluded: "Of course this amendment will only operate when *some proceeds of the illegal expropriation turn up in the United States," id.* at 607-608 (emphasis added).

Attorney General Katzenbach, who testified before the same Committee the day after Professor Olmstead, took the same view. In his opening remarks in opposition to the Amendment he stated:

"What are we talking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States. That is very unlikely to occur. . . . It is generally an accident because the owner of that property, or the foreign government involved, is not going to bring that property into this country and is deterred from doing it by the fact that normally, if that property is bought into this country, the assets from it are going to be frozen in an outstanding dispute with the foreign country."

House hearings, *supra,* at 1235. See also, *id.* 1236, 1237 (testimony of Mr. Katzenbach).

Congressman Gross, another member of the House Foreign Affairs Committee, urged that the Amendment be broadened to enable the owner of expropriated property to

seize Cuban property in the United States as an offset for the value of property seized by Cuba. See House Hearings, *supra,* at 1249; see also *id.*, at 1050. As appellant Banco Nacional points out, this is precisely the position First National City takes in this litigation. However, First National City has cited no legislative history, and we have found none, which indicates that Mr. Gross' suggestion was thought to have been adopted by Congress when it reenacted the Hickenlooper Amendment.

Banco Nacional quotes the following colloquy between Mr. Katzenbach and Representative Gallagher of the House Foreign Affairs Committee as indicative of the legislators' and witnesses' understanding of the scope of the Amendment:

> "Mr. Gallagher: This amendment merely applied to property that works its way back into the United States; correct?
>
> Attorney General Katzenbach: Yes.
>
> Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that made the seizure?
>
> Attorney General Katzenbach: That is correct."

House hearings, *supra,* at 1247. See also colloquy between Mr. Katzenbach and members of the Committee, *id.* at 1245-1247; colloquy between Professor Henkin and Mr. Gallagher, *id.* at 1072; testimony of Professor Metzger, *id.* at 1025-1031; testimony of Professor McDougal, *id.* at 1043, 1050-1051; statement of the Committee on International Law of the Association of the Bar of the City of New York submitted to the House Foreign Affairs Committee in support of the Amendment, *id.* at 1316. See also Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), 728 (letter to Chairman Fulbright from George W. Ball); 730-760 (an appendix consisting of material submitted by

Senator Hickenlooper, much of it from the earlier House hearings).

Given all of this background, we can find no basis for holding that the present case is one "in which a claim of title or other right to property is asserted by [First National City] . . . based upon (or traced through) a confiscation or other taking . . . ." 22 U.S.C. § 2370(e)(2). To do so would stand the statute on end. If one fact is clear from the legislative history, it is that this language was designed to be invoked by American firms in order to afford them "a day in court"—and presumably a monetary recovery—when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country. We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalizes American property.[14]

VI.

Indeed, it seems to us that such an interpretation of the Hickenlooper Amendment would run counter to another important Congressional policy.

Through the provisions of Subchapter V of the International Claims Settlement Act of 1949, Pub. L. 88-666, 78 Stat. 1110, amended Oct. 19, 1965, Pub. L. 89-262, § 1, 79 Stat. 988; Nov. 6, 1966, Pub. L. 89-780, § 1, 80 Stat. 1365, 22 U.S.C. §§ 1643-1643k (1970 Supp.), on October 16, 1964, Congress provided for "the determination of the amount and validity of claims against the Government of Cuba . . . [arising] out of nationalization expropriation, intervention,

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[14] See Henkin, Act of State Today: Recollections in Tranquility, 6 Col. J. of Transnational Law, 175, 184-5 (1967); see also *id.* 185, n. 40.

or other takings of . . . property of nationals of the United States . . . ." 22 U.S.C. § 1643 (1970 Supp.). Obviously, the expropriation of First National City's branches in Cuba gave rise to a claim of the sort which Congress intended to be submitted to the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643b(a) (1970 Supp.).

On the other hand, Congress and the Executive Branch have also acted, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1970 Supp.); Proc. 3447, 27 F.R. 1085, 3 C.F.R., 1959-1963 Comp., to block all Cuban assets present in this country as of July 8, 1963. See 31 C.F.R. §§ 515, et seq. (1970).[15] At present there is no provision in the federal statutes or regulations providing for vesting of the blocked Cuban assets—whether assets of the Cuban government or of Cuban nationals—in the government of the United States for sale and use by the Foreign Claims Settlement Commission to pay those who have submitted claims to the Commission based on expropriations by the Cuban government.[16]

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[15] The report of the Treasury Department, Office of Foreign Assets Control, on the census of blocked Cuban assets, is reprinted in Housing Hearings, *supra*, at 1264. The report states, as reprinted at 1264, that the Cuban assets control regulations were adopted "under section 5(b) of the Trading with the Enemy Act of 1917, as amended, to implement the policy of an economic embargo of Cuba set forth in Proclamation No. 3447, which was issued by the President under section 620(a) of the Foreign Assistance Act of 1961, Public Law 87-195."

[16] In 1964, when Congress enacted subchapter V of the International Claims Settlement Act of 1949, relating to claims against Cuba, it included as section 511(b) a provision vesting the blocked assets of the Cuban government in the United States government and further providing that the proceeds of such assets of the Cuban government should be used to reimburse the United States government for the expense of operating the Foreign Claims Settlement Commission and the Department of the Treasury in processing claims against Cuba. Pub. L. 88-666, section 511(b), 78 Stat. 1113 (October 16, 1964). However, that section was repealed one year later, see Pub. L. 89-262, section 5, 79 Stat. 1988 (October 16, 1965). The report of the Senate Foreign Relations Committee states that "the committee

It is this system of claim submission and blocking of assets which First National City seeks to circumvent. Due to the Cuban expropriation of its branches, First National City felt justified in breaching whatever loan agreement it had entered with Banco Nacional on July 7, 1960, by prematurely foreclosing on the collateral held as security. It was fortunate for First National City that sale of the collateral brought more than enough money to cover the principal amount and interest then due on the loan. First National City was also fortunate in that they sold the security before Cuban assets were blocked in July, 1963. Had they waited, it seems clear, under 31 C.F.R. § 515.202 (1970), that any sale of the collateral put up by Banco Nacional as security on the loan in suit would have been impossible without a license from the Office of Foreign Assets Control of the Treasury Department. See 31 C.F.R. § 515.801 (1970). As matters now stand First National

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was persuaded by the following argument advanced by the Department of State:

> 'it is the Department's view that vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of rights. The Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalizations, expropriations, intervention, and taking. To vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world.' "

Sen. R. No. 701, 89th Cong., 1st Sess., 2 U.S.C. Code Cong. & Admin. News p. 3583 (1965).

It seems to us that Congress' acceptance of the State Department's argument points up to some extent the wisdom of Mr. Justice Harlan's observation in *Sabbatino* that to permit American courts to pass on the validity of expropriations would have an effect on "[r]elations with third countries which have engaged in similar expropriations." 376 U.S. at 432.

City has recouped dollar-for-dollar on the loan transaction; by its position on this appeal, it seeks something more.

We do not believe that First National City has any special claim to the excess proceeds of the sale of the collateral. Any judgment rendered in favor of Banco Nacional on its first cause of action would, after deduction of attorney's fees, become a blocked Cuban asset.[17] Presumably, if other attempts at settlement of the claims fail, the blocked Cuban assets will eventually be vested in the United States government and the Foreign Claims Settlement Commission will begin compensation of the claimants. As part of the pool of assets available for compensation, such a judgment in favor of Banco Nacional would serve to provide at least partial compensation of all those claimants who suffered losses in the Cuban expropriations. See testimony of Attorney General Katzenbach, House Hearings, *supra,* at 1235-1236. No authority which First National City has cited in its brief establishes any right to a preference such as that which would result if the decision of the district court were to be affirmed. While Judge Bryan noted in a footnote that "[a]ny sum which First National City is permitted to set-off in this action will of course have to be

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[17] See Report of Treasury Department, Office of Foreign Assets Control, *Census of Blocked Cuban Assets, supra* note 15, reprinted in House Hearings, *supra,* at 1264.

First National City's judgment debt to Banco Nacional for the excess amount it holds would have to be reported to the Office of Foreign Assets Control on Form TFR-607 under any one of several classifications of "reportable property" specified on that form.

The report also states that the deadline for filing reports for the Office's census of blocked Cuban assets was March 15, 1964. However, the report notes that there are probably many people holding blocked assets who did not know of the deadline, and states "extensions of time for filing were granted when necessary." There is little question that an extension would be granted in a situation such as the present case, where lengthy, litigation to settle the dispute over entitlement to the excess funds carried the parties past the filing deadline.

taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City," 270 F. Supp. at 1011, note 10, we observe that such a set-off against its total claims with the Commission would still allow First National City a dollar-for-dollar recoupment on a significant portion of its total claim for the value of its expropriated property—something which few, if any, other claimants are likely to receive.[18]

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[18] We note from the affidavit of First National City Bank submitted below that its claims for expropriated property is relatively small, about three million dollars, as compared to some claims which must have been filed by American corporations with large industrial operations in Cuba.

The windfall First National City seeks can best be understood through a hypothetical example. Assume that there are twenty claimants who have filed with the Foreign Claims Settlement Commission pursuant to 22 U.S.C. § 1643 (Supp. 1970). Ten claimants, called "A" claimants, each have claims for fifteen million dollars; four claimants, called "B" claimants each claim five million dollars. The twentieth claimant is First National City Bank which, for purposes of this example, also seeks five million dollars. Further, assume that absent the sum in dispute in this case the total value of blocked Cuban assets held by the Office of Foreign Assets Controls is 20 million dollars.

If the claims are eventually allowed to vest against the fund and some sort of pro rata payment authorized, First National City Bank will do considerably better if it is permitted to retain the Cuban assets which fortuitously were in its reach, rather than if it had merely held the excess here in dispute so that in time it would have been blocked and become part of the fund.

Assume First National City has seized the collateral, sold it, and realized three million dollars over the amount owed with interest. If, as it seeks in this suit, it keeps the three million as a set-off against its claims against Cuba, the fund compromised of all blocked assets would still equal twenty million dollars. However, the claims against the fund would be reduced from 200 million to 197 million, since First National City would have to off-set the three million dollars against the five million dollars we have assumed it has claimed with the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643 (Supp. 1970). On this basis, the pro rata share would be 10.9 cents on the dollar. The "A" claimants, seeking 15 million each, would each receive about 1.52 million; the "B" claimants, with claims for 5 million, would each take about .57 million. And First National City, with its claim

VII.

Since there is a factual dispute, to the extent of more than $500,000, between the parties as to the total amount realized from the sale of the collateral and as to the amount of interest properly deducted, which Judge Bryan was not called upon to resolve due to his disposition of the summary judgment motions, we remand to the district court for a determination of the exact amount of excess left after the principal sum and the interest due thereon is deducted from the proceeds of the sale of the security. When this determination is made, the district court is directed to grant Banco Nacional's motion for summary judgment on its first cause of action.

Reversed and remanded for further proceedings consistent with this opinion.

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reduced to 2 million, would receive about .24 million. But to this must be added the 3 million which it took directly, bringing its total recovery to 3.24 million.

In the second case, First National has not (or is not allowed to) take the 3 million for its own account; rather, it stays in Banco Nacional's name and in time becomes part of the fund. Now, the fund has 23 million, while the claims are 200 million, since First National City has nothing to off-set against its initial claim of 5 million. Here, the pro rata share would be about 11.5 cents on the dollar. The "A" claimants would receive about 1.73 million each, while the "B" claimants—including First National City—would take about .575 million each.

As can be seen, by resorting to self-help and avoiding the Congressional scheme for orderly settlement of these claims, First National City stands to profit considerably. Under our hypothetical figures, the difference is between 3.24 million and .575 million dollars. The windfall of course is not at the expense of Cuba, but rather comes out of the shares of all other American nationals who have lost property by the Cuban expropriation.

APPENDIX E

Opinion and Order, Dated July 20, 1970 and Entered July 21, 1970

UNITED STATES DISTRICT COURT

S.D., NEW YORK

July 20, 1967

BANCO NACIONAL DE CUBA,

Plaintiff,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant.

No. 60 Civ. 4664.

Shearman & Sterling, New York City, for defendant; Henry Harfield, Charles C. Parlin, Jr., William Harvey Reeves, New York City, of counsel.

Rabinowitz & Boudin, New York City, for plaintiff; Victor Rabinowitz, Mary M. Kaufman, Henry Winestine, Eleanor Fischer, New York City, of counsel.

Opinion

FREDERICK VAN PELT BRYAN, *District Judge:*

This action by Banco Nacional of Cuba (Banco Nacional), the financial agent of the Government of Cuba, against The First National City Bank of New York (First National City) is one of the numerous cases before me raising issues arising out of confiscations of American-owned property in Cuba by the Castro Government.

The amended complaint alleges two claims for relief, the first for the excess realized by First National City on the

sale of collateral held as security for a loan, and the second for deposits by nationalized Cuban banks in First National City in New York. The answer pleads a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches. First National City has now moved for summary judgment pursuant to Rule 56(a), F.R.C.P., and Banco Nacional has cross-moved for the same relief on the first claim and for judgment dismissing the counterclaims. Rule 56(b).

I.

The facts giving rise to the first claim for relief are not in serious dispute. On July 8, 1958, First National City, a New York banking corporation doing business in New York and throughout the world, made a loan of fifteen million dollars to Banco de Desarrollo Economico y Social (Bandes), a governmental corporate agency of the Republic of Cuba. The loan was secured by United States Government bonds and obligations of the International Bank of Reconstruction and Development pledged to First National City by Fondo de Estabilizacion de La Moneda (Fondo), another Cuban governmental agency, and Banco Nacional. On January 1, 1959, the Castro Government took control of the Republic of Cuba. The fifteen million dollar loan to Bandes was renewed for another year on July 8, 1959. Thereafter by virtue of Cuban Law No. 730, February 16, 1960, and Law No. 847, June 30, 1960, Bandes was dissolved and Banco Nacional succeded to the rights and obligations with which we are concerned in this action, including the obligation to repay the loan. The Republic of Cuba guaranteed repayment. On July 7, 1960, the terms of the loan were renegotiated for the last time. Banco Nacional repaid five million dollars, and requested and obtained an agreement from First National City to defer demand for the balance of ten million dollars for one year. A proportionate amount of collateral was then released.

September 16, 1960, however, marked the date of an irreparable breach of the relationship between these parties. On that day the Cuban militia seized all eleven of First National City's branches located in Cuba. On the following day the issuance of Executive Power Resolution No. 2 left no uncertainty as to the permanent nature of these confiscations; under the terms of the resolution the Cuban State was declared "subrogated" to all of First National City's rights, obligations, and liabilities.[1]

In the light of this turn of events First National City, on September 23, 1960, sold the collateral it held as security for the unpaid portion of the loan and applied the proceeds in payment of the principal obligation and accrued interest. Defendant concedes—and plaintiff for purposes of this motion does not deny—that the amount realized on the sale of collateral exceeded by $1,810,880.51 the ten million dollars of unpaid principal and the $65,000 interest then due.[2] The first claim for relief seeks judgment for the amount of the excess.

The answer of First National City to the first claim alleges in substance that the Republic of Cuba is the real party in interest in this action, that the Cuban government is indebted to the defendant in an amount exceeding the sum demanded in the amended complaint by reason of the confiscation of its Cuban property, and that therefore the defendant is entitled to set off this outstanding obligation as a complete defense to the claims asserted by Banco Nacional. First National City has also interposed an affirmative counterclaim for the amount of the excess, and seeks dismissal of plaintiff's claim with prejudice. Both parties recognize that this court on the present papers cannot determine the value of First National City's Cuban properties which have been confiscated. But apart from this issue of

[1] See note 6, infra.

[2] The amount sought in the first count of the amended complaint was $2,347,000.

fact the basic questions in this case are posed by the motions before me.

The ultimate legal issues on the first claim are clearly drawn. Banco Nacional strenuously contends that the affirmative counterclaim and the set-off by way of defense are barred, alternatively, by principles of sovereign immunity and the act of state doctrine. The dispositive question is simply whether defendant is precluded on those grounds from asserting—either affirmatively or by way of set-off as a complete defense—a claim for the value of its confiscated Cuban properties.

II. *Sovereign Immunity*

There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation.[3] And as a general rule a state which initi-

[3] Plaintiff at various times has argued that defendant's claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity. This position is, of course, flatly inconsistent with the sovereign immunity argument. Moreover, throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional De Cuba was an instrumentality of the Cuban government. Banco Nacional v. Sabbatino, 193 F. Supp. 375 (S.D. N.Y. 1961), aff'd, 307 F.2d 845 (2d Cir. 1962), rev'd, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). As Judge Weinfeld pointed out the complaint there alleged that plaintiff was a "public corporation wholly owned by the government." Banco Nacional De Cuba v. Sabbatino, 27 F.R.D. 255, 258 (S.D. N.Y. 1961). The present amended complaint alleges only that plaintiff "is a corporate body existing under * * * the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba." But any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional. Plaintiff alone has exclusive charge of directing the banking function of the state. Law No. 891, arts. 1, 2, 3, Oct. 14, 1960. And it is plaintiff who shall exercise "the monetary sovereignty of the Nation." Law No. 930, art. 1, Feb. 23, 1961. The Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit. Compare Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930).

ates proceedings in a court of another sovereignty waives immunity from a counterclaim or set-off to the extent that it does not exceed the amount of the state's claims. ALI, Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965). This waiver extends to defensive counterclaims which do not arise out of the subject matter of the claims of the state which initiated the action. National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955); Wacker v. Bisson, 348 F.2d 602, 610 (5th Cir. 1965); American Hawaiian Ventures, Inc. v. M. V. J. Latuharhary, 257 F. Supp. 622, 626-627 (D. N.J. 1966); see Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). The ultimate policy reason for this is simply that "fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438, 84 S. Ct. 923, 945, 11 L. Ed. 2d 804 (1964); see Pugh & McLaughlin, Jurisdictional Immunities of Foreign States, 41 N.Y.U. L. Rev. 25, 53-54 (1966).

So viewed, there is no doubt that the assertion of First National City's defensive counterclaim as a set-off is not barred because plaintiff happens to be an instrumentality of the Cuban government. When a foreign government institutes suit in the courts of this country, it can expect nothing more and nothing less than substantial justice between the parties. Since the decision in National City Bank of New York v. Republic of China a suit brought by a foreign government is no longer a one-way street. The doctrine of sovereign immunity cannot be raised in this court as a technical bar to any legitimate defensive counterclaims or set-offs advanced by First National City.[4] Whether the

[4] Pons v. Republic of Cuba, 111 U.S. App. D.C. 141, 294 F.2d 925 (1961), cert. den., 368 U.S. 960, 82 S. Ct. 406, 7 L. Ed. 2d 392 (1962), is not to the contrary because the party there aggrieved by the Cuban confiscation was a Cuban national,

defendant has such legitimate defenses—and if so in what amount—are, of course, entirely separate questions.[5]

III. *The Act of State Doctrine.*

The basis for defendant's set-off is that the Government of Cuba, in whose shoes Banco Nacional stands, confiscated eleven of First National City's Cuban branches without compensation and in violation of international law. Under Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964), inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting "in judgment on the acts of the government of another, done within its own territory." 376 U.S. at 416, 84 S. Ct. at 934, quoting Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). However, the holding in *Sabbatino* was for all practical purposes overruled by the Hickenlooper amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-659 (Sept. 6, 1965), the constitutionality of which has been upheld. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D. N.Y. 1965), aff'd, July 31, 1967 (2d Cir.). Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state "in violation of the principles of international law, including the principles of compensation." The Hickenlooper Amendment specifically stated that it did not apply "in any case in which an act of a foreign state is not contrary to international law".

[5] As mentioned, First National City has also interposed an affirmative counter-claim to recover the amount by which the compensation for the confiscations exceeds the $1,810,880.51 figure. I hold, however, that plaintiff's limited waiver of immunity by instituting this suit permits only the assertion of a defensive counterclaim that "does not exceed the amount of the state's claims." Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965).

The ultimate act of state doctrine issue boils down to whether the confiscation of First National City's Cuban property violated principles of international law. In my view the seizures here involved had precisely this effect for a combination of reasons.

In the first place the various decrees authorizing the confiscations did not provide for adequate payments to First National City. The scheme of "illusory compensation" outlined by Judge Waterman in *Sabbatino*, 307 F.2d at 862, has been totally ineffective in practice in the intervening years. No compensation whatsoever appears to have been forthcoming and none can reasonably be expected in the foreseeable future.

It is true that both the Second Circuit and the Supreme Court in *Sabbatino* pointedly refrained from resolving the delicate question of whether the mere failure, without more, to provide adequate compensation to aliens whose property has been expropriated constitutes a breach of international law. 376 U.S. at 428-430, 84 S. Ct. 923; 307 F.2d at 862-864. But Congressional passage of the Hickenlooper Amendment has removed any doubt on this score—at least insofar as the courts of this country are concerned. While the reference to the "principles of compensation" in 22 U.S.C. § 2370(e)(2) is somewhat open-ended because it does not state specifically that compensation is a *sine qua non* of full compliance with international law, subsection (1) of the same statute leaves no doubt as to the views of Congress on the subject. That provision requires the suspension of assistance under the foreign aid program to the government of any state which, after effectuating the confiscation of property that is at least 50 per cent owned by United States citizens or corporations, "fails within a reasonable time * * * to take appropriate steps * * * to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law". The legislative

history of the Hickenlooper Amendment and its extensions is replete with statements reaffirming what is plain on the face of the legislation, i.e., that international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property. S. Rep. No. 170, 89th Cong., 1st Sess. at 19; 110 Cong. Rec. 18936-37, 18946 (Aug. 14, 1964); 110 Cong. Rec. App. A5157 (daily ed. Oct. 7, 1964) (Senator Hickenlooper's Statement on Conference Report); see 22 U.S.C. § 2370(a)(2).

It is clear to me that this rule of compensation legislatively announced by Congress is fully consistent with generally accepted principles of international law established by the authorities reviewed by the appellate courts in *Sabbatino*. It is therefore unnecessary to reiterate the settled proposition that "the rules of international law * * * are subject to the express acts of Congress." United States ex rel. Pfefer v. Bell, 248 F. 992 995 (E.D. N.Y. 1918). This court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here. See The Nereide, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769 (1815); Paquette Habana, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); United States v. Siem, 299 F. 582, 583 (9th Cir. 1924); Schroeder v. Bissell, 5 F.2d 838 (D. Conn. 1925); Reeves, The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy of Errors, 20 Vand. L. Rev. 429, 492-93 (1967).

There is more to this case, however, than a naked failure by the Cuban government to comply with general principles of compensation. Violations of international law spring from other sources also. The September 16, 1960, takeover of First National City's branch banks in Cuba had all the earmarks of the seizure of American-owned properties which Judge Waterman in *Sabbatino* condemned as violative of international law for reasons apart from the failure to

provide compensation. Here, as in *Sabbatino*, the expropriations were consummated under Cuban Law No. 851, July 6, 1960, which granted the government *carte blanche* authority to confiscate all properties owned by nationals of the United States. As Judge Waterman pointed out, see 307 F.2d at 865 n. 14, this law plainly was passed as a retaliatory measure against the United States Government's reduction of the sugar quota allotted to Cuba. On September 17, 1960, the day after the Cuban militia seized defendant's branches, the Cuban government issued Executive Power Resolution No. 2, which, like Resolution No. 1 involved in *Sabbatino*, justified the seizures of American-owned property as retaliation for an "act of cowardly and criminal aggression," that is, the reduction of the sugar quota.[6]

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[6] The vitriolic language of Resolution No. 2, Def. Ex. 22, left no doubt as to the retaliatory and discriminatory motivation for the bank seizures:

"Whereas: Law No. 851 of July 6, 1960, published in the *Gaceta Oficial* of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the Government of the United States of America and the representatives of monopolistic interest of that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

"[C]onfiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country." 307 F.2d at 866. Thus the allegations in the decrees that the general public interest necessitated the seizures of First National City's property must be discounted when the manifest purpose of the confiscations was political retaliation of the rankest sort.

Moreover, as in *Sabbatino,* the reprisals involved in this case evidently evince discrimination rising to the level of a violation of international law. Not only was Law No. 851

Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has forced our economy to become dependent on a single crop and a single export.

Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counter-revolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with

aimed solely at United States Nationals, but also a general confiscation of the remaining Cuban banking properties did not take place until October 14, 1960,[7] almost a month after First National City's branches were seized. Even then the end result was not that Cuban-owned enterprises and American-owned enterprises were treated alike, compare 307 F.2d at 845, because the compensation provisions for Americans, unlike those for Cuban citizens, were entirely dependent upon the creation of a fictitious fund consisting of "twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban

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the obvious intention of promoting conspirational activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary duty, to nationalize all the American banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

We Resolve:

First, To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York
2. The First National Bank of Boston
3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to the above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies."

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[7] Law No. 891, Def. Ex. 10.

sugar in excess of three million Spanish long tons at a price of not less than 5.75 cents per English pound (f.a.s.)." 307 F.2d at 862. Beyond this, First National City obviously was damaged by discrimination to the extent it did not enjoy the profitable use of its Cuban properties during the period non-American bank enterprises operated unmolested.

IV.

The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law. Thus First National City is entitled to set-off against the first claim for relief such amount as may be due and owing to it from the Cuban Government as compensation for the seized Cuban properties, and I so hold.[8]

Banco Nacional is quite correct in pointing out that the amount owing to First National City from the Government of Cuba under the applicable international law "principles of compensation"[9] cannot be determined on this record. The actual amount of the set-off which can be asserted here poses delicate questions of fact and law requiring further careful consideration. See *Reeves*, supra at 505-508, for a consideration of some of the factors involved. It therefore

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[8] The *Sabbatino* amendment is inapplicable "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here.

[9] 22 U.S.C. § 2370(e).

cannot be determined on these motions whether, as defendant contends, the amount of the set-off equals or exceeds the sum of $1,810,880.51 admittedly owing to the plaintiff. If it does, defendant is entitled to judgment dismissing count one.[10]

V.

The second claim for relief may be speedily disposed of. It alleges that a number of Cuban banks which were nationalized pursuant to Law No. 891 in October, 1960, at that time maintained accounts with the defendant at its office in New York City. Banco Nacional as agent of the Cuban Government now lays claim to these funds, amounting to some $33,812.93, by virtue of the confiscation decree declaring it to have full title to the property of the Cuban banks who maintained these accounts in New York.

The short answer to this claim is simply that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. den., 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966), quoting ALI, Restatement of Foreign Relations Law § 46 (Proposed Official Draft, 1962). The Cuban decree, like the attempted confiscation of the accounts in *Republic of Iraq*, is plainly contrary to our policy and laws. It is not entitled to extraterritorial enforcement in United States courts as to property located within the United States. Republic of Iraq v. First National City Bank, supra; see F. Palicio y Compania v. Brush, 256 F. Supp. 481 (S.D. N.Y. 1966), aff'd per curiam, 375 F.2d 1011 (2d Cir. 1967); see Note, International Conflict of Laws: Limitations Imposed

[10] Any sum which First National City is permitted to set-off in this action will, of course, have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City. See International Claims Settlement Act, § 501, 78 Stat. 1110 (1964), 22 U.S.C. § 1643.

On Effect American Courts May Give Foreign Confiscations, 1966 Duke L.J. 828. Defendant is therefore entitled to judgment dismissing count two.

VI.

In the light of what has been already said the motions before me are disposed of as follows:

(1) Defendant's motion for summary judgment on the second claim for relief is granted. Since I find there is no just reason for delay, it is directed that final judgment in favor of defendant will be entered accordingly. Rule 54(b), F.R.C.P.

(2) Plaintiff's cross-motion for summary judgment on its first claim and on the counterclaims is in all respects denied.

(3) Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against the first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

This opinion shall constitute my specification of the facts supporting that holding pursuant to Rule 56(d), F.R.C.P. The case will be tried on the sole issue of the amount which defendant is entitled to assert by way of set-off.

It is so ordered.

APPENDIX F

Statutes

Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(1), as amended, 78 Stat. 1012-1013 (Oct. 7, 1964):

(e) (1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) * * *

(C) * * *

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

* * * * *

Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965)—The Hickenlooper Amendent:

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621 et seq.

§ 1623(h) The Commission shall notify al claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe,

to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise....

§ 1643 It is the purpose of this subchapter to provide for the determination of the amount and validity of claims against the Government of Cuba, or the Chinese Communist regime, which have arisen since January 1, 1959, in the case of claims against the Government of Cuba, or since October 1, 1949, in the case of claims against the Chinese Communist regime, out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States, and claims for disability or death of nationals of the United States arising out of violations of international law by the Government of Cuba, or the Chinese Communist regime, in order to obtain information concerning the total amount of such claims against the Government of Cuba, or the Chinese Communist regime, on behalf of nationals of the United States. This subchapter shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims....

§ 1643b (a) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba, or the Chinese Communist regime, arising since January 1, 1959, in the case of claims against the Government of Cuba, or since October 1, 1949, in the case of claims

against the Chinese Communist regime, for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States....

§ 1643e In determining the amount of any claim, the Commission shall deduct all amounts the claimant has received from any source on account of the same loss or losses.

Cuban Law of Nationalization No. 851

I. DR. OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and

the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and the Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interests or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above

referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

(a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

(b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3.000.000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America".

(c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule (b).

(d) Such annual interest as cannot be paid out of said Fund referred to above in Rule (b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

(e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

NOW THEREFORE: I hereby order that this law to be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.
Rolando Díaz Aztaraín, Minister of the Treasury.

(Official Gazette No. 130, of July 7, 1960).

Fundamental Law of Cuba

ARTICLE 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payments of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge.

ARTICLE 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law.

APPENDIX G

Letter of Professor Olmstead amplifying his testimony at Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong. 1st Sess. (1965), 578-615 passim, 1306:

TEXACO, INC.,
New York, N.Y., March 29, 1965.

HON. DONALD M. FRASER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN FRASER: We appreciated the opportunity to visit with you on March 17 and to discuss further the rule of law or *Sabbatino* amendment to the Foreign Assistance Act. It was most stimulating and interesting.

Our discussion of the possible general impact of this amendment on the property and activities of foreign governments indicated that it would be useful to amplify my interpretation of the proposed amendment. In accordance with your request, I am writing to supplement my answers to your questions at the hearing, and those answers should be read in the light of what I say here.

As you know, in addition to the "act of state" doctrine, with which our amendment is exclusively concerned, the separate doctrine of "sovereign immunity" controls when a foreign government may be sued or its assets attached. The general effect of the sovereign immunity rule as applied by our courts is that a foreign government cannot be sued or its property attached except in limited instances recognized in U.S. practice or in those cases where the foreign government itself waives its sovereign immunity by bringing suit in our courts.

Pursuant to the "Tate letter" of 1952 in which the United States accepted the so-called restrictive view of sovereign

immunity, the State Department has usually raised no objection to attachment of foreign government property utilized in activities of a "commercial nature"—if the claim sued on arose out of commercial activities outside the foreign state. It is our understanding that a claim arising out of an expropriation in a foreign country would not fall within this exception to sovereign immunity because (*a*) it does not arise out of ordinary commercial activities and (*b*) it arises from acts that took place within the territory of the foreign state.

The amendment that we are supporting does not in any way change these separate and distinct rules on sovereign immunity. The language of the amendment indicates that it applies only to a court's refusal to make a determination on the merits "on the ground of the Federal act of State doctrine." It would not apply to a refusal to make a determination on the merits in a case in which the doctrine of sovereign immunity would be appropriate.

I can summarize the foregoing by saying:

(*a*) The doctrine of sovereign immunity controls when a foreign government or its instrumentality may be sued and its property attached;

(*b*) The rule of law or *Sabbatino* amendment does not affect the doctrine of sovereign immunity;

(*c*) Under the rules of sovereign immunity now advanced by our State Department, an expropriated American investor can usually attach the commercial-type property taken from him if it comes within the jurisdiction of an American court, but he cannot attach other property of the Government unrelated to the expropriation in order to obtain compensation for the taking. In other words, he can attach his expropriated sugar or its proceeds coming from Castro Cuba but he cannot attach a Cuban Airlines plane landing at New York in the absence of a waiver of sovereign immunity.

If a foreign government waives the defense of sovereign immunity or it is otherwise inapplicable, the rule of law amendment can have an impact in disposing of a secondary defense based on the "act of state" doctrine. Thus, if Castro sues a U.S. bank whose branch he has seized in Havana for return of certain Cuban Government accounts or collateral held by the U.S. bank, the present U.S. rule (established in the Supreme Court decision in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955)) is that by bringing suit Castro has waived sovereign immunity and that the U.S. bank is permitted to make a counterclaim or setoff for the value of its seized Havana branch. In this counterclaim or setoff the U.S. bank could rely on the rule of law amendment in order to overcome a counterdefense based on the "act of state" doctrine. Thus, the impact of the rule of law amendment is determined by how the State Department and the courts apply the existing rules of sovereign immunity.

In view of your suggestion that this answer be included in the record, I am taking the liberty of sending a copy of this letter to Chairman Morgan for such inclusion.

With kindest personal regards, I am,

Sincerely,

CECIL J. OLMSTEAD.